



14 February 2014

Filomena Antunes
Regulation Branch - Telecommunications
Commerce Commission
PO Box 2351
Wellington 6140

By Email: Filomena.Antunes@comcom.govt.nz

Dear Filomena

UCLFS connection charges s30R review

Thank you for the opportunity to provide comments on the Commission's preliminary views relating to the UCLFS connection charges. We support the Commission's proposed approach.

This review is largely a mechanical process to update the connection charges for UCLFS following changes to the UCLL STD. The Commission made a decision in November 2011 (D738) that the UCLFS connection charges are the same as the UCLL connection and monthly recurring charges and would be updated to match the UCLL connection charges. When the Commission determined the updated geographically averaged UCLL prices in December 2012 it resulted in the automatic update of the monthly recurring charge for UCLFS based on the express wording in the UCLFS price list for the recurring MPF charge. However, because the UCLFS STD's list of one-off charges are expressed in dollar terms (not as a reference to the equivalent UCLL charge) these charges were not automatically updated – a simple oversight that requires correction by way of a review or clarification of the UCLF STD.

We support the Commission's proposal to update all one-off and recurring core charges automatically by reference to any future UCLL price changes. This is consistent with the legal framework, Decision 738 and the policy intent behind the introduction of the UCLF service. It will enable automatic updates following the UCLL FPP decision and any future reviews of UCLL prices without requiring separate formal processes in future.

This is largely a formal exercise to implement the UCLFS Determination

As the Commission notes in its draft report, all parties agreed during the consultation leading up to Decision 738 that UCLFS and UCLL connection charges should be aligned. However, revised UCLL prices had not yet been finalised and, rather than adopt the draft UCLL connection prices, the Commission adopted the then current UCLL connection prices for the purposes of the UCLFS STD. The Commission noted in Decision 738 that it would update UCLFS connection at the time that the UCLL pricing review was completed.

All of the parties who addressed alignment in their submissions on this process supported it. Chorus agreed that a consistent approach should be taken to other UCLF Service core charges and that these should be aligned with comparable charges for the UCLL service. Chorus noted in its 5 October 2012 submission that:

We accept that the connection charges for UCLFS should be aligned with the connection charges for UCLL that are being determined as part of the Commission's review of UCLL Pricing. Our views on the appropriate pricing are also set out in some detail in our submission on UCLL pricing. While we don't intend to repeat those arguments here, we would support a consistent approach to UCLL and UCLFS connection charges being applied.¹

Vodafone also supported the Commission's proposed approach to pricing generally.²

At paragraph 93 of the D783, with reference to the connection charges, the Commission stated:

*These charges will, however, be reviewed **as part of** the expanded review considering updating the UCLL monthly rental prices and connection charges to reflect current benchmarks for UCLL prices, to ensure that comparable charges under both the UCLL and UCLF Service STDs **remain the same**. [Emphasis added]*

Accordingly, the issue was considered and determined by the Commission in November 2011:

- Core one-off and recurring charges for UCLL and UCLFS were to be the same;
- UCLFS charges were part of the UCLL benchmark review;
- UCLFS and UCLL charges would remain the same.

The Commission's signal to all parties was clear, Access Seekers and Chorus were of one mind on the issue and the formal update should have taken place in December 2012 at the same time as the UCLL benchmark Determination review was made.

It was perhaps understandable that the formal process to update UCLFS connection charges did not take place immediately following the release of the UCLL benchmark update. There was a longer than anticipated time between the UCLFS Determination and the update of UCLL benchmarks; and

¹ See paragraph 24 here <http://www.comcom.govt.nz/dmsdocument/8485>

² See paragraph 6b. here <http://www.comcom.govt.nz/dmsdocument/8487>

substantial attention was immediately dedicated to the draft UBA decision which was released at the same time as the final UCLL update.

Given this oversight, and its effect, we therefore support the Commission's proposal to automatically link Schedule 2 core charges to their corresponding UCLL comparators in the same way as recurring charges have been. It will be an efficient way to ensure efficient flow through of prices from the UCLL FPP pricing review that will set TSLRIC based prices. Linking the price lists will ensure prices remain aligned.

Backdating supports workable regulatory processes

We also support the Commission's proposal to backdate UCLFS connection charges to December 2012. We appreciate that it is open to the Commission to backdate the UCLFS price by virtue of the powers granted to it under section 30R of the Act.³ The Commission has previously considered backdating following a section 30R price review in the context of UBA and interconnection pricing reviews.

The Court of Appeal decision in *Telecom v Commerce Commission and Telstra Clear Limited* 2006 considered the Commission's backdating powers and discretion in some detail, and is instructive in this case. Our interpretation of the court's reasoning in that case is that any decision to backdate should be determined with reference to whether, in the circumstances, backdating best gives effect to the section 18 purpose in the Act.

Relevant to the purposive considerations in this case is the very real concern that Chorus, despite being well aware of the relevant parts of the UCLF Determination:

- Did not as a matter of course pass on the reduced connection charges;
- When asked to do so by Telecom, refused to pass through the lower UCLL connection charges until the Commission formally updated the charges; and
- When this section 30R review was initiated made public comments to the effect that it should not be required to pass through such reduced charges.

In our view this evidences an exercise of market power which the Commission is expressly tasked with controlling under part 2 of the Act. In that regard backdating when the UCLFS connection charges take effect reduces the incentive for exercising market power which, ultimately, facilitates competition in the long term interests of end users.

We recognise that any section 18 consideration involves a weighing up of factors relevant to each case. On balance we think that here the factors that favour backdating outweigh any arguments against it. In this case, backdating of an agreed price change to the date of the decision is particularly important to the integrity of the regulatory regime.

³ Section 30R(3) provides that "In exercising the power conferred by subsection (2), the Commission may specify how and **when** a replacement standard terms determination or a variation, addition, or deletion of terms specified in the determination, takes effect in relation to – (a) the initial standard terms determination..." (emphasis added)

For whatever reason there was an omission and consequential updates were not made to the UCLFS price schedule when they should have been. Where the intended approach was clear, we consider - as an important point of principle - that the Commission should remedy omissions in a manner that does not favour a particular party by implementing the intended approach as agreed. Further, when parties are aware that regulated prices are to be updated with effect from a known future date or event, they are required to implement such price changes accordingly, and not profit from a delay in the running of a formal process to update a document.

Workable, predictable and durable regulatory processes are, ultimately, in the long term interests of end users. Enabling a monopoly access provider to benefit from an oversight is not. Discouraging regulatory arbitrage also reduces regulatory costs by, for example, encouraging parties to identify any discrepancies or omissions and collaborating to resolve them. Telecom had unsuccessfully sought to engage Chorus on the omission prior to the current S3OR review.

Telecom first focused on the flow through of UCLL prices to UCLFS in early July 2013 through our ongoing bill assurance process. We formally raised the discrepancy with Chorus on 17 July 2013, and then again at a senior executive level meeting on 1 August 2013. Chorus has been unwilling to engage on the matter and, instead, referred us to the Commission for resolution.

In this case, there was a clear expectation that UCLFS connection charges would be updated with revised UCLL prices. The Commission signalled, as early as the final UCLFS decision in November 2011, that it would align the UCLF and UCLL connection charges when the UCLL re-benchmarking exercise was done. In other words, the UCLFS decision put the parties formally on notice that UCLFS charges would change to reflect updated UCLL prices. At no stage did parties express any concerns about the then proposed approach.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'JWS', is positioned above the typed name of the sender.

John Wesley-Smith
General Manager
Regulatory Affairs